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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1156~~ 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1156

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PRELIMINARY STATEMENT

Respondent asserts that the judgments of the state courts are correct and that certiorari should be denied.

The District Court of Oklahoma County, Oklahoma, sustained defendant's demurrer to the final Amended Petition of plaintiffs, Petitioners herein, and said plaintiffs refusing to plead further the court dismissed the action (R. 97; Appendix A to Petition herein). This was affirmed by the Supreme Court of Oklahoma (Appendix B to Petition herein). So, if the decision sustaining the demurrer was right upon any ground, or for any reason, affirmance was required. This is elementary under established Oklahoma law. The trial court's decision was thus affirmed.

SUMMARY OF ARGUMENT

Among the grounds presented in and by the demurrer for dismissal of the action and a brief summary of the argument thereon are:

1. Said Petition wholly fails to state facts sufficient to state a cause of action in favor of the plaintiffs and against this defendant;

2. Facts pleaded in the Petition, when considered with those of which the court was and is required to take judicial notice, preclude recovery by plaintiffs;

3. Plaintiffs have no legal title to the chose in action sought to be asserted by them;

4. The contract relied upon and which forms the alleged basis for plaintiffs' claimed right to recover shows on its face that in any event plaintiffs are not the proper parties to institute and maintain this suit;

5. Said Amended Petition shows on its face that conditions precedent to recovery have not been performed;

6. Said Amended Petition shows on its face that plaintiffs have not exhausted their administrative remedy or attempted to do so and said Amended Petition wholly fails to allege that plaintiffs have even sought to avail themselves of administrative remedies available to them and prescribed by law.

TRUE CHARACTER OF THE CASE

Notwithstanding statements of Petitioners (Petition for Certiorari, pp. 3, 5, 8-9) tending to mislead this Court to the contrary, this was an action in contract upon the

lease involved and was not an action for damages sounding in tort. This clearly appears from the record.

At page 35 of the case-made appears a motion filed in the court below to require the plaintiffs to elect whether they will proceed upon the contract or upon tort. At page 37 appears the "Journal Entry" covering the order made by the trial court upon this motion which *by agreement of the parties*, strikes from the Petition the allegation that defendant violated the conservation statutes of the State of Oklahoma and denies defendant's motion to require an election upon the following recited commitment of plaintiffs' counsel to the court:

> "2. Upon announcement of plaintiffs' counsel to the Court that with said language aforesaid stricken from said Petition only one cause of action is stated, presented by or intended to be asserted in and by said Petition and that only recovery in contract will be sought in this action by plaintiffs, the motion of the defendant to require election as between two separate causes of action is overruled and denied and likewise the alternative motion of said defendant to require separate statement and numbering of separate causes of action is overruled and denied upon the same basis and for the same reason;"

ARGUMENT

I.

The Opinion of the Supreme Court of Oklahoma

The Supreme Court of Oklahoma largely based its decision upon and in consideration of the following proposition stated by defendant in its brief:

Proposition One

The plaintiffs cannot institute, maintain or prosecute this action and cannot procure a judgment in this cause in their favor.

It is to be noted that the defendant did not urge and the Supreme Court of Oklahoma did not decide that plaintiffs could not prosecute the action merely because they were restricted Indians. The personal incapacity of the plaintiffs was not urged nor was it decided. The defendant merely asserted, and now asserts, and the Supreme Court of Oklahoma only held that these plaintiffs could not ignore the covenants of their lease (including the regulations and the law forming a part thereof) and institute and maintain an action contrary thereto, and thus assert a cause of action they did not possess and which they did not control, and then only by virtue of assuming the existence of facts essential to their case but not alleged and not possible of good faith allegation under the circumstances.

By the express terms of the lease (par. 3(c), Appendix A hereto, p. ii)* and the regulations (Section 172.14, Appendix A hereto, p. v)* all bonuses, rents, royalties and funds payable on account of or under the lease can only be paid to the Secretary of the Interior or his designee. The Secretary, and only the Secretary, can have, recover, receive or control these funds.

As to this point, the law seems to be clear. The terms of the lease, the statutes of Oklahoma, the statutes of the United States, the rules and regulations of the Secretary

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* Pertinent portions of the lease and of the Regulations are set out in Appendix A hereto.

of the Interior (which must be read into the lease) and the decisions of the state courts and of the federal courts preclude the institution and maintenance of this action for recovery by the plaintiffs.

This is not to say that the Indians themselves are incapacitated as litigants but it is to say that by the law and their contract the Indians are precluded from recovery.

Upon consideration of paragraph 6 of the controlling lease (Appendix A hereto, p. iii) together with the other provisions of the lease, paragraphs 2, 3(b)(1); 3(c); 3(d); 3(f); 3(g); 8; 10 (Appendix A hereto, pp. i to iv), and the broad specific authority reserved to the Secretary and his designees by the Rules and Regulations, Chapter 1, Bureau of Indian Affairs—Title 25, Part 189, and Leasing of Allotted Lands for Mining, Part 172, and Code of Federal Regulations—Title 30, Mineral Resources, Part 221, Oil and Gas Operating Regulations (Appendix A hereto, pp. iv to x), it becomes conclusively apparent that the Indians *agreed* that they would neither have, nor exercise nor seek to exercise any right to institute, maintain or prosecute any claim "at law or in equity" either upon the lease or for breach thereof. Please bear in mind that the Secretary, *as a federal restriction* upon the lease, the land it covered and the emoluments thereof, unconditionally reserved the right to determine all the incidents of the lease, including what amounts would be due to be paid thereon, their origin, their nature and the time of payment. This necessarily included the right to determine the negatives also, *i.e.*, what is not payable and what were proper operations, what use of gas by lessee was royalty free, and all the circumstances which entered into all these things. This is accentuated by

reference to Title 25, Section 172.23 (Appendix A hereto, pp. viii-ix) which says that the "Secretary" will cancel the lease *if at any time* he is satisfied that the provisions of the lease or the regulations have been violated. Since he has not "cancelled" the lease here involved it must be concluded that he has ascertained that neither the lease nor the regulations have been violated. It was exactly *because* of these rights of affirmative *and negative* determination that it was expressly stated (Appendix A hereto, p. iii) by the Secretary in his required form of lease (par. 6) that *only* where "restrictions are removed" can Lessors (the Indians):

> "be entitled to any available remedy in law or equity for breach of this contract by the lessee."

These restrictions have never been removed.

This is substantially what the Supreme Court of Oklahoma decided and confirmed. Many decided cases and the opinions therein support this conclusion. While the Supreme Court of Oklahoma did not cite all of them, we consider the following authorities pertinent and supporting:

—*Seber* v. *Spring Oil Co.*, 33 F.Supp. 805 (D.C., Okla., 1940);

Town of Okemah, Oklahoma v. *United States*, 140 F.2d 963 (10th Cir., 1944);

Hansen v. *Hoffman*, 113 F.2d 70 (10th Cir., 1940);

United States v. *Hinkle*, 261 Fed. 518 (8th Cir., 1919);

United States v. *Fitzgerald*, 201 Fed. 295 (8th Cir., 1912);

United States v. *Hellard*, 322 U.S. 363 (1944);

LaMotte v. *United States*, 254 U.S. 570 (1921);

United States v. *Noble*, 237 U.S. 74 (1915);

In re Long's Estate, 207 Okla. 259, 249 P.2d 103 (1952).

State action, legislative or judicial, may not set aside nor alter, modify or evade United States restriction on Indian lands. A requirement by regulation that mineral rentals, royalties and profits from a lease on restricted Indian lands be paid to the Secretary of the Interior is a federal "restriction" which the state courts must honor and abide by. If the relief sought would, if granted, conflict or interfere with United States restrictions, management, supervision or operations of Indian lands or their profits or rentals or royalties therefrom, then no relief can be granted. Such must be an invariable principle, or federal "rules and regulations" might as well not be provided for or adopted.

—*Bunch* v. *Cole*, 263 U.S. 250 (1923);

Bowling v. *United States*, 233 U.S. 528 (1914);

Chisholm v. *House*, 160 F.2d 632 (10th Cir., 1947);

United States v. *Moore*, 284 Fed. 86 (8th Cir., 1922);

Phenninghausen v. *Horineck*, 112 Okla. 94, 240 Pac. 81 (1925);

Williams v. *Lee*, 319 P.2d 998, 1003 (Ariz. 1958).

Thus, the cases upon which Petitioners place their sole reliance (Petition, pp. 6-7) are clearly not in point as the Supreme Court of Oklahoma found and indicated. Incidentally, the statute (Act of Congress, April 12, 1926, paragraph 3, 44 Stat. 239) forming the basis for the decision in

Sadler v. *Public National Bank and Trust Company of New York*, 172 F.2d 870 (10th Cir., 1949), involves and applies only to Indians and property of the Five Civilized Tribes and does not apply to Comanche Indians such as Petitioners here. The opportunity afforded to the Government in this case to "take over" this litigation upon behalf of the Indians, if it was deemed by the Government that a cause of action existed, was merely a gesture of grace and to afford a convenient opportunity for the only proper party to litigate the claim if a good faith claim should exist. And in truth, the whole philosophy announced by the Supreme Court in *Heckman* v. *United States*, 224 U.S. 413 (1912), supports the decisions of the state courts in the instant case.

II.

Additional Reasons for Denying Certiorari

Aside from the points particularly discussed and directly decided by the Supreme Court of Oklahoma (Appendix B to Petition) the following, not found by such court to be necessary of discussion (Appendix B to Petition, p. vii) support the judgment of that court and indicate that certiorari should be denied.

Proposition Two

Even assuming, arguendo, that this action could be properly instituted and maintained by the plaintiffs, the allegations of the Petition, including the express language of the lease which is attached to and made a part of the Petition do not assert liability of the defendant for the relief sought or any other relief obtainable by plaintiffs.

As to this point, it will be made clear by a reading of the Amended Petition, the lease involved and the rules and regulations applicable thereto, that essential allegations to

state a cause of action are missing from the Petition. For instance, there is no allegation of a specific violation of the rules and regulations of the Secretary of the Interior or that what was done by the defendant was not strictly in compliance with supervisory directions and/or acquiescence by the superior authority, to-wit, the Supervisor of the lease designated by the Secretary of the Interior for such authority and such purpose. There is no allegation of application to the Secretary (or his designees) and his arbitrary or fraudulent refusal to hear or decide or to grant relief. Neither is there any allegation to challenge or negate the continuous finding and satisfaction of the Secretary of the Interior that neither the lease nor the regulations "have been violated." This finding and satisfaction are necessarily established by the absence of action by the Secretary, under the duty imposed upon him and the exclusive authority given him by Title 25, Section 172.23 (Appendix A hereto, p. viii), to cancel this lease if there has been a "violation" of the lease or regulations. It must be presumed, in the absence of specific and express allegations to the contrary, that the Secretary of the Interior through his designated Supervisor performed his full duty and adequately supervised the operation of this lease and the production of oil therefrom in the interest of the Lessors, Title 30, Section 221.4 (Appendix A hereto, p. vii), and that the rights of the Lessors were adequately and properly safeguarded in the course of these operations by the Supervisor.

—*Minter* v. *Crommelin,* 18 How. 87, 15 L.Ed. 279 (1856);

United States v. *Ahtanum Irrigation District,* 236 F.2d 321 (9th Cir., 1956);

United States v. *Barnsdall Oil Co.*, 127 F.2d 1019 (10th Cir., 1942);

United States ex rel. Harris v. *Ragen*, 177 F.2d 303 (7th Cir., 1949);

Shafer v. *United States*, 229 F.2d 124 (4th Cir., 1956);

Bonapart v. *Nelson*, 142 Okla. 54, 285 Pac. 100 (1929).

Therefore, it must be held, in the absence of express allegation to the contrary, that the Supervisor found that under the particular circumstances there was no basis for demanding the royalties here sued for, such as: (1) that there was no market for the gas, Title 30, Section 221.35 (Appendix A hereto, p. vii); (2) that the gas vented was "beneficially consumed," Lease, paragraph 10 (Appendix A hereto, p. iv); (3) that the only alternative was to flare the gas and produce the oil and receive the oil royalties rather than to shut the oil production down and see adjoining lease production drain the oil from the Petitioners' lease, Lease, paragraph 3(b)(1) (Appendix A hereto, p. i), all the while receiving no oil royalty from oil produced; and (4) that the vented casinghead gas was used by the lessee in the production of oil and thus royalty free. It must be held that all of the factors were weighed and that it was determined that the only way to produce the oil in accordance with the terms of the lease was for Skelly to flare the casinghead gas and thus "use" the casinghead gas in the course of its operations in the production of oil. See Lease paragraph 3(c) (Appendix A hereto, p. ii) where it is agreed that:

"* * * oil, and/or gas used by the lessee for development and operation purposes on said lease * * * shall be 'royalty free.'"

If it be conclusively presumed, as it must be, that the Secretary and his Supervisor and his superior and the Commissioner of Indian Affairs did their duty, there would seem to be no question but that authorization to flare the casinghead gas *royalty free,* in order to get the oil, has been received by the lessee from the only power which could refuse such authorization. Also, under such presumption every fact, every demand, every equity, every circumstance has been considered, weighed and given effect by the Secretary. No intervention or substitution has been sought by the United States. Thus, going even beyond presumption, it is established that the United States officials did their duty and decided that there was no just cause for demand on the defendant for the alleged "royalty" sought to be recovered.

Proposition Three

Plaintiffs have not exhausted their administrative remedy and prior thereto could not have their claim adjudicated in court.

As indicated by the lease and all the pertinent Rules and Regulations, the lessor Indians have had at all times a complete and comprehensive administrative remedy within the Department. The nature and course of such a remedy is fairly illustrated by the recitals in the opinion of the Court in *California Co.* v. *Seaton, Secretary of the Interior,* 187 F.Supp. 445 (D.C., D.C., 1960).

Sec. 172.23 of Title 25 (Appendix A hereto, p. viii) and Sec. 221.66 of Title 30 (Appendix A hereto, p. ix) of the Rules and Regulations of the Secretary of the Interior make this unmistakable and expressly clear. In the latter it is provided, *inter alia:*

> "An appeal from any order issued under authority of the regulations in this part may be filed as hereinafter set forth in this section. * * * An appeal to the Director may be taken from any order of the Supervisor * * *. An appeal from any decision of the Director may be taken to the Secretary * * *. With regard to Indian land, the Commissioner of Indian Affairs will exercise the functions vested in the Director."

Nothing is more fundamental nor better established than that a litigant must exhaust his available administrative remedies before seeking judicial relief. This is well established by decisions of both state and federal courts.

—*Constantin* v. *Martin,* 216 F.2d 312 (10th Cir., 1954);

Furrow & Co. v. *American Airlines,* 102 F.Supp. 808 (D.C., Okla., 1952);

Sanders v. *Oklahoma Employment Securities Commission,* 200 Okla. 366, 195 P.2d 272 (1948).

Conditions precedent to the bringing of any action have not been made or performed or alleged. Underlying requisite determinations by the Secretary of the Interior (exclusively his function), which are conditions precedent to the maturing of a cause of action, have either been made contrary to the existence of a cause of action or have not yet been made at all and are not alleged. Plaintiffs have

made no move to exercise their administrative remedy. For this reason alone, even assuming that plaintiffs otherwise would have had standing in court, the demurrer was good and must have been sustained and the action dismissed.

In its opinion (Appendix B to Petition, p. x) the Supreme Court holds, after referring to the terms of paragraph 6 of the lease, that "under the maxim 'expressio unius est exclusio alterius' this provision deprives the lessors of a right to prosecute a suit for breach of the lease contract until the restrictions are removed, and there is no allegation in the Petition that the restrictions have been removed." This is supported by many authorities not cited in the opinion among which are:

—*National Labor Relations Board* v. *West Kentucky Coal Co.*, 116 F.2d 816 (6th Cir., 1940);

Cornell v. *McAllester*, 121 Okla. 285, 249 Pac. 959 (1926);

National Gas Development Corp. v. *Oklahoma Tax Commission*, 188 Okla. 557, 111 P.2d 483 (1941).

III.

Oklahoma Supreme Court Procedure

Petitioners seek to complain of procedural methods of the Supreme Court of Oklahoma, adopted and used by it under its inherent powers as the highest appellate court of the sovereign State of Oklahoma, in studying the cause and obtaining preliminary reports of its Special Masters, as officers of the court, as to the nature of the cause, its issues and probable reasons for its decision. That the finality of decision and the exercise of an independent judgment by

the Supreme Court are reserved and actually exercised by that court are certain, as shown by the record in the certificate of the court itself as appended to its decision. Moreover, two Petitions for Rehearing have been independently considered and overruled by the Supreme Court of Oklahoma.

This practice of the Supreme Court of Oklahoma is of long standing, has been widely publicized, concurred in, affirmed by and participated in by members of the organized Bar in Oklahoma for a long time. Similar practices have been a part of the judicial machinery generally for almost countless years. "Special Masters" and "Referees" are old and established instrumentalities for the administration of justice.

Petitioners disavow any claim of actual prejudice, bias or error in result flowing from or sustained by virtue of the method used. They do not assert that the Certificate of the Supreme Court of Oklahoma is false in stating that the decision and opinion were the independent acts of the court after its full independent consideration. Their complaint is without substance, but the very fact that they seek to make it here and to plunge this Court into purely procedural matters and possible controversy over judicial power, authority and rectitude of a sovereign state's judiciary would alone seem to indicate that the Writ sought should be denied.

CONCLUSION

It is thus suggested that for each, every and all of the reasons above presented and upon the basis of the authorities submitted hereby, the Writ of Certiorari petitioned for should be denied.

Respectfully submitted,

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